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Judicial mediators: are they constitutionally valid?

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Judicial mediators: are they constitutionally valid?

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Introduction

I am aware of the Victorian Supreme Court's interest in the Canadian model and in using judges to 'shadow' cases and step in to mediate where appropriate and am currently giving consideration to whether Victoria can lead the charge for fully fledged judicial mediators within our court system ... judicial mediation is the cutting edge of juridical practice, requiring a unique combination of skills, and I look forward to exploring the possibilities of such a program in the months to come.²

The Attorney-General of Victoria has set the proverbial 'cat amongst the pigeons' by suggesting that judicial mediators could be appointed in Victoria sooner rather than later. Judicial mediators have been operating in the Canadian provinces of British Columbia and Ontario for 10 years or more and mediation has been embraced by the judiciary, more widely under the descriptor 'judicial dispute resolution' (JDR), in other provinces of Canada for some time. However their appointment overseas has been the subject of controversy here in Australia, with some commentators believing that the appointment of judicial mediators blurs the line between the role of the courts as being purely for adjudication and the role of mediator as helping parties to seek a consensual solution to their dispute.³

Judicial mediators are appointed judges of the respective court but assigned the task of mediating as opposed to adjudicating cases before the court. Some commentators suggest that judicial mediators are simply sitting judges who, as part of their ordinary judicial functions, participate in mediation⁴ while others suggest that judicial mediators should be retired judges who effectively 'see out' their careers as mediators with the court they formerly adjudicated for.⁵ However, is the appointment of judicial mediators a valid exercise of the parliament's power under State and Federal constitutions?

Before attempting to answer this question it should be stated that this article relates to courts established and judges appointed under Chapter III of the *Commonwealth of Australia Constitution Act 1900*. However, pursuant to *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, the High Court of Australia extended the separation of powers doctrine in relation to the application of Chapter III judicial power to State Supreme Courts. In other words, the restrictions over investing judges with non-judicial power and its exceptions are applicable at State level where the State court has been invested with the powers of a federal court pursuant to s 77 of the Commonwealth Constitution.

Constitutional validity of judicial mediators

From the conventional perspective of most modern legal cultures, judicial mediation is a contradiction in terms. Judges are supposed to judge (not mediate), to apply law (not interests), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle).⁶

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In simple terms, the separation of powers doctrine prescribes that control over the community, state or federal, is vested in three types of governmental power, namely legislative, executive and judicial. The legislative power to make law is vested in the parliament, the power that converts political policy into draft law is vested in the executive (more commonly known as the cabinet) and judicial power to interpret legislation and create common law is vested in the courts. In a country that exhibits a true separation of powers, the three arms of government operate independently of one another in relation to the autonomy of the institution and the personnel charged with the responsibility of exercising the powers of the respective institution. For example, the courts should not be influenced or carry out the bidding of the executive or the parliament. Courts should carry out their functions independent of the influence of the politically motivated executive and parliament and execute their functions according to the rule of law.

Defining 'judicial power'

An important concept regarding the functioning of courts is that courts duly constituted under Chapter III of the Constitution can only exercise judicial power. However, what is meant by the phrase 'judicial power'? The High Court in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ, gave the following definition:

I am of opinion that the words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

To the author's knowledge there have not been any decisions in Australia that define judicial mediation as being, or not being, an exercise of judicial power. Therefore, if we accept the above definition then the power to decide controversies between people is

clearly within the realms of the judicial power exercised by a court. However, mediation does not seek to decide issues between people. It is designed (and should be executed) to assist people to resolve issues between themselves — the power to decide vesting with the people themselves. The word 'decide' connotes a judicial function that includes adjudication of cases which mediation claims not to be. Therefore, this article will proceed on the basis that mediation, administered by judicial mediators, would not be classed as the exercise of judicial power.

Given this definition, and keeping in mind that courts may not exercise non-judicial powers, the question becomes: How can the parliament appoint judicial mediators if they are not required to exercise judicial power? In *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers' case*), the High Court found that the vesting of judicial power in the Arbitration Court, a body also exercising non-judicial power, was unconstitutional. However, there are a number of exceptions to the *Boilermakers'* principle that courts cannot exercise non-judicial power, one being circumstances where non-judicial functions are assigned to judges, not in their judicial capacity, but as *personae designatae* (in their personal capacity). In other words, 'a person who happens to be a federal judge may validly be appointed or assigned to perform non-judicial functions provided that the appointment or assignment is addressed to the individual person.'⁷

Test of 'personae designatae'

In a case relating to the appointment of a Federal Court judge to draft a report for a Minister of the Crown, who would consider such a report when making decisions in relation to the protection of land of significance to Aboriginals, the High Court of Australia found in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 that, 'the formation of opinions and the giving of advice involved in the making of the report were incompatible with the constitutional independence of the judiciary from the executive government.'⁸ The test espoused by the



majority of the Court in *Wilson* states:

The statute or the measures taken pursuant to the statute must be examined in order to determine, first, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. Next, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law (hereafter 'any non-judicial instruction, advice or wish'). If an affirmative answer does not appear, it is clear that the separation has been breached. The breach is not capable of repair by the Ch III judge on whom the function is purportedly conferred, for the breach invalidates the conferral of the function. If the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds — that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?⁹

In assessing the role and function of judicial mediators as being constitutionally compatible or incompatible with the exercise of judicial power against the test in *Wilson*, we need to assess the two limbs set out in that case. The first limb inquires as to whether mediation is an integral part of, or is closely connected with, the functions of the legislature or the executive government. If the answer to that inquiry is in the affirmative, then the function is incompatible with the exercise of judicial power and would lead to an erosion of public confidence in the judicial institution. This would render the performance of such functions invalid. Unlike *Wilson*, where there was a close connection with the statutory discretion of the Minister to consider the report by the judicial officer, the appointment of judicial mediators would appear to not be an

integral part of, or have no such close connection with, the legislature or the executive. In *Wilson*, the Court found that the function of a Federal Court judge in making a report under the relevant legislation was performed as an integral part of the process of the Minister's exercise of power because:

The performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial adviser.¹⁰

The process of judicial mediation is an independent function of the court that takes place because the parliament and the court want to conduct the business of the court in a more efficient manner.

The case of judicial mediators can be distinguished from the facts in *Wilson* because judicial mediation does not involve mediators being part of or connected with the role of the executive or the legislature. The process of judicial mediation is an independent function of the court that takes place because the parliament and the court want to conduct the business of the court in a more efficient manner. The legislature merely empowers the court to conduct its business in an efficient manner by providing appropriate legislation for cases to be referred to mediation. Therefore, in addressing the first limb of *Wilson*, it can be said that the appointment of judicial mediators is not a function that is an integral part of, or is closely connected with, the legislature or the executive government.

The second limb in *Wilson* requires an inquiry to be made regarding whether the function must be performed independently of any instruction, advice or wish of the legislature or the executive government, other than a law or an instrument

made under a law. If the answer to the inquiry is in the affirmative, then there is no incompatibility of function leading to erosion in public confidence of the judicial institution, and therefore a breach of the separation of powers. The function of judicial mediation in resolving disputes between people should not be conducted under any advice from the legislature or the executive government. While government is entitled to and has prescribe statutory referral of matters to mediation and set out a process for judicial mediation, it would not

be required to dictate the substantive conduct of mediation. For example, what issues are discussed, what options, if any, are proffered for settlement, and whether parties choose to settle. In this respect the substantive elements of judicial mediation would be conducted independent of any instruction, advice or wish of the legislature and the executive government.

The Court goes on to suggest that, should the second limb inquiry produce an affirmative answer, an additional inquiry should take place. The Court stated that if the function is one which must be performed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Chapter III judge to be exercised on political grounds, that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?

Given that there have been no appointments of judicial mediators in Australia, one must hypothesise on what empowering legislation for such



appointments would look like and whether it would include any politically prescribed discretion. As stated above, it is unlikely that the appointment of judicial mediators would include anything beyond the creation of the role and the mandate to mediate cases coming before the courts. The only likely discretion would be that granted to judicial mediators to recommend or

senior administrative officers of the court. In *Harris v Caladine* (1991) 172 CLR 84, the High Court was asked to determine the validity of the *Family Court Rules* which delegated to registrars of the Family Court of Australia the power to make certain orders under the *Family Law Act 1975* (Cth). The Court found that such a delegation of judicial power to non-

may have recourse to a hearing and a determination by a judge.¹¹

The first limb of the test in *Harris's* case inquires as to whether, notwithstanding the delegation of power, judges of the court continue to bear the major responsibility of the exercise of judicial power in relation to important aspects of contested cases. The appointment of judicial

mediators would not upset such a balance of power in that judges would continue to be the sole keepers of judicial power in the deciding of cases before the court. As before, there would be no 'crossover' of functions between judicial mediation and judicial power to decide cases at trial. The second inquiry asks whether the exercise of judicial power by non-judicial officers is capable of judicial review — if so, the task of judicial mediation is a valid delegation of judicial power to judicial mediators. The

application of the test in *Harris's* case can be distinguished in the case of the appointment of judicial mediators. Therefore, the application of the second limb of the test in *Harris's* case may not be directly applicable to the case of the appointment of judicial mediators. In *Harris's* case the nature of the delegation was to empower non-judicial officers to make certain decisions embodied in orders of the court.

According to the second limb of the test it is always necessary to have the ability to judicially review such decisions for errors in law and fact, and to correct those decisions. In the case of judicial mediators, they are not empowered to decide any issues of procedure or substance that would need to be the subject of judicial review. In other words, the nature of the delegation is not to make decisions, rather, to merely execute a process where the only decision-making regarding settlement is made by the parties themselves. In judicial mediation, there is no decision made by a non-judicial officer (the judicial mediator) for a judge to review.

Conclusion

Tucker is of the view that judicial mediation is not an exercise of judicial

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not recommend mediation in certain cases. It is not envisaged that such discretion would carry any implied or express political considerations.

The test for judicial mediation legislation is to ensure that it is not open to political influence or puts judicial mediators in the position of exercising political discretion. Given the nature of the mediation process, this should not occur — the mediator is not the decision maker and therefore their sphere of political influence is limited. As such, the majority's view that non-judicial functions leave open the possibility of political influence and the exercising of political discretion, may not necessarily apply in the case of judicial mediation. Equally that the non-observance of procedural fairness leads one inextricably to conclude that the function, as a non-judicial function, is also to be regarded with some apprehension.

Test for the delegation of non-judicial power

Another exception to the *Boilermaker's* principle that courts may not exercise non-judicial power is where the judicial power of the Commonwealth is delegated to registrars, masters (now known as 'associate judges' in NSW) and other

judicial officers was a valid exercise of such power.

The Court went on to establish a test for the delegation of non-judicial power as an exception to the *Boilermaker's* principle in the following way:

The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters. The second condition is that the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court. For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on questions of both fact and law, we consider that the delegation will be valid ... The importance of insisting on the existence of review by a judge or an appeal to a judge is that this procedure guarantees that a litigant



power and, therefore, judicial mediators may only be appointed under the doctrine of *personae designatae*.¹² He also believes that despite a potential valid appointment as a *persona designata* a judge exercising the functions of judicial mediator may 'pose a very real threat to the bubble of impartiality,'¹³ resulting in such an appointment being declared *ultra vires* under Chapter III of the Constitution.

Justice Michael Moore of the Federal Court of Australia agrees with Tucker that judicial mediators would not be exercising judicial power. However, his Honour has a different view from Tucker's on the issue of whether judicial mediation diminishes public confidence in the integrity of the judiciary as an institution. His Honour's argument is essentially two-fold: first his Honour argues that the incompatibility doctrine must by necessity include notions of compatibility. Moore J states:

The attributes and professional experience ordinarily demanded of a judge and the judicial characteristic of impartiality (both perceived and real) are attributes and experience often required of a mediator. That the same characteristics are required in both roles may militate against a conclusion that acting as a judicial mediator is incompatible with the judicial function.¹⁴

In other words Moore J is suggesting that the roles of judicial mediator and judge are compatible. The important characteristic of impartiality is an attribute required of both roles and a judicial officer has the ability to ensure that impartiality is maintained, not just in a substantive sense, but in a practical sense. This naturally leads to his Honour's second argument, that is if sufficient safeguards can be put in place in courts employing judicial mediators, there can be no argument that such a role diminishes public confidence in the integrity of the judiciary as an institution. In this respect, his Honour suggests that judges acting in the role of judicial mediator should be statute barred from hearing the same matter at trial and any subsequent appeal.

Moore J's views are in keeping with s 4.7 of the *Guidelines to Judicial Conduct* endorsed by the Council of Chief Justices of Australia which state:

Many judges consider that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. The difference lies in the interaction of a mediator with counsel and parties, often in private — that is, in the absence of opposing counsel or parties, which is seen to be incompatible with the way in which judicial duties should be performed, with the risk that public confidence in the judiciary may thereby be impaired. Many judges would see this as a matter of court policy.

In some courts, the Rules of Court with respect to mediation specifically recognise the appointment of a serving judge as a mediator. The success of judicial mediation in those jurisdictions appears to justify the practice. The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.¹⁵

Moore J juxtaposes the development of the doctrine of incompatibility with its development in the United States and concludes:

or academic writing or otherwise) in the research I have undertaken that a judge acting as a mediator might be viewed in the United States as not exercising a power that falls within the Judicial Branch.¹⁶

Moore J finally states that there is no constitutional impediment to judges acting as mediators. Given there have been no judicial mediators appointed to any courts in Australia, a definitive answer to whether judicial mediators would diminish public confidence in the integrity of the judiciary as an institution is moot. Until a thorough debate is had or until a judicial mediator is appointed and their authority is challenged, there can be no definitive answer.

We watch this space with some interest! ●

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Endnotes

1. This article is a re-worked portion of a larger paper that is due to be published in the *Australasian Dispute Resolution Journal* (2006) 17(3) and (4). My thanks to my colleague Dr Margaret Kelly who critically

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There has been no suggestion, as far as I am aware, in either authority or academic commentaries that there is incompatibility, for the purposes of Art III of the United States Constitution, arising when judges act as mediators. Indeed I have not seen it suggested (in litigation

reviewed this article.

2. The Hon Rob Hulls, Victorian Attorney General, 'Changing the culture of disputes' (2005) Dec *The IAMA News* 43.

3. Most notably, Sir Laurence Street in 'The courts and mediation — a



warning' (1991) 2 *Australasian Dispute Resolution Journal* 203; and 'Mediation and the judicial institution' (1997) 71 ALJ 794. See also, The Honourable Hugh Landerkin QC in 'Judges as mediators: what's the problem with judicial dispute resolution in Canada' (2003) 82 *Canadian Bar Review* 249.

4. Landerkin, above note 3, at 261.

5. Chodosh, Hiram E Chodosh, 'Judicial mediation and legal culture' (1999) 4(3) *Issues of Democracy* 1. (Electronic journal of the USA Department of State found at <<http://usinfo.state.gov/journals/itdhr/1299/ijde/chodosh.htm>> accessed 7 March 2006), at 4.

6. Chodosh, above note 5, at 1.

7. Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Sydney: The Federation Press, 4th ed, 2002) 676.

8. Blackshield and Williams, above note 7, at 685.

9. *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

10. At 18.

11. *Harris v Caladine* (1991) 172 CLR 84, at 95, per Mason CJ and Deane J.

12. Tucker P, 'Judges as Mediators: A Chapter III Prohibition' (2000) 11 *Australasian Dispute Resolution Journal* 84.

13. Tucker, above note 12, at 94, citing Brown AJ, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, at 68-70.

14. Moore M, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australasian Dispute Resolution Journal* 188, at 194.

15. Cited by Moore, above note 14, at 195 and available from the Australian Institute of Judicial Administration website at <www.aija.org.au/online/GuidetoJudicialConduct.pdf> (accessed 22 February 2006).

16. Moore, above note 14, at 196.